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Inc. v. U.S. Int'l Trade
247, 1258, 65 CCPA 105,
480 (1978) (Judge Rich

that the '508 patent is not invalid under section 102 or 103. Additionally, the patent is not invalid for double patenting under the criteria articulated in this court's precedent. Thus, we affirm the district court's conclusion that, insofar as it is challenged here, the '508 patent is valid. We find no clear error in the findings below that the patent is infringed by Carman's device under the doctrine of equivalents, but not literally infringed. Thus, we affirm the judgment of the district court.

AFFIRMED.

NIES, Circuit Judge, concurring-in-part.

I concur in the decision that the '508 patent is not invalid for double patenting. However, I do not share the doubts that principles of double patenting should apply to design/utility patent situations. I also do not share the view that the Third Circuit standard which limited double patenting to "same invention" type is reconcilable with the decisions of the U.S. Court of Customs and Patent Appeals, e.g. *In re Thorington*, 418 F.2d 528, 537, 57 CCPA 759, 768, 163 USPQ 644, 650 (1969).

More significantly, I do not agree that in obviousness type double patenting each patent must be found obvious from the other. If one patent is obvious from the other and has the effect of extending its term, the second to issue is invalid. In this case I agree with the majority that it would not have been obvious to one of ordinary skill in the art with knowledge of the '068 design patent to make the claims of the '508 patent. Thus, the patentee has not obtained extended protection for the device claimed. Alternatively, since a device covered by the claims of the '508 patent need not take the shape claimed in the design patent, the term of the design patent is not being improperly extended by the utility patent.

Since I discern no possible extension of the term of protection of the invention of either patent, I agree that the '508 patent is not invalid for double patenting.

Ruby WESTON, Petitioner,

v.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Respondent.

Appeal No. 83-859.

United States Court of Appeals, Federal Circuit.

Dec. 30, 1983.

Petitioner, who had been removed from her position as equal opportunity specialist for the Department of Housing and Urban Development for refusing to cooperate in internal agency investigation, appealed from final order of the Merit Systems Protection Board sustaining the Department's action. The Court of Appeals, Bennett, Circuit Judge, held that removal of employee for refusing to cooperate in internal agency investigation relating to certain alleged improprieties was shown to promote efficiency of the agency, was within permissible range of discipline for such conduct, and was warranted despite fact that employee may have relied on advice of counsel in refusing to cooperate.

Affirmed.

1. Witnesses ⇐297(7)

Fifth Amendment privilege against compulsory self-incrimination may be asserted in administrative investigation to protect against any disclosure that individual reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. U.S. C.A. Const.Amend. 5.

2. Criminal Law ⇐412.1(1)

Threat of removal from one's employment position constitutes "coercion" which renders any statements elicited thereby inadmissible in criminal proceedings against

parties so coerced. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

3. Officers and Public Employees ⇐66

When employee is once granted immunity through so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with agency investigation. U.S.C.A. Const.Amend. 5.

4. Officers and Public Employees ⇐66

Invocation of the *Garrity* rule for compelling answers to pertinent questions about performance of agency's employee's duties is adequately accomplished when that employee is duly advised of his options to answer under immunity granted or remain silent and face dismissal. U.S.C.A. Const.Amend. 5.

5. Officers and Public Employees ⇐69.7

Department of Housing and Urban Development employee's refusal to participate in proposed agency investigation involving alleged improprieties on employee's part, after employee and her counsel were advised of invocation of the *Garrity* rule by statement distributed at interview and read by regional inspector general, was not justifiable out of any valid Fifth Amendment considerations, and supported charge of refusing to cooperate during official agency inquiry. U.S.C.A. Const.Amend. 5.

6. Officers and Public Employees ⇐72(2)

Finding of the Merit Systems Protection Board that agency employee's termination would promote efficiency of agency is factual finding which is to be sustained on appeal unless that administrative determination is not supported at least by substantial evidence from the record taken as a whole. 5 U.S.C.A. §§ 7512, 7513(a), 7703(c).

7. Officers and Public Employees ⇐72(2)

To sustain Merit Systems Protection Board's removal of agency employee based upon finding that employee's termination would promote efficiency of her agency, record need only disclose such relevant evidence as might be accepted by reasonable mind as adequate to support conclusion reached. 5 U.S.C.A. §§ 7512, 7513(a), 7703(c).

8. Officers and Public Employees ⇐72(1)

Removal of Department of Housing and Urban Development employee for refusal to cooperate in internal agency investigation relating to certain alleged improprieties was shown to promote efficiency of the agency, notwithstanding that circumstances which gave rise to the allegations occurred during earlier employment in entirely different local and department. 5 U.S.C.A. § 7513(a).

9. Officers and Public Employees ⇐72(2)

In reviewing appropriateness of agency-imposed removal, it is not the place of the Court of Appeals to determine what course would have been pursued were the Court in charge, and given great reluctance of part of the courts to become enmeshed in agency disciplinary process, great deference is accorded to sound discretion of the agency in such matters.

10. Officers and Public Employees ⇐72(2)

If agency punishment of employment exceeds that permitted by statute or regulations or is so harsh that is amounts to abuse of discretion, it cannot be permitted to stand.

11. Officers and Public Employees ⇐69.7

Removal of Department of Housing and Urban Development employee for refusal to cooperate in internal agency investigation relating to certain alleged improprieties was within permissible range of discipline for such conduct under agency adverse action handbook.

12. Officers and Public Employees ⇐72(1)

Dismissal of Department of Housing and Urban Development employee for refusal to cooperate in internal agency investigation relating to certain alleged improprieties was not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, given supporting factors including seriousness of alleged offense,

public contact required of employee in her duties with the agency, and lack of effectiveness of alternate sanctions, despite seven-year unblemished employment record and purported lack of willfulness in refusing to cooperate in the investigation. 5 U.S.C.A. § 7512.

13. Officers and Public Employees ⇐69.7

Fact that Department of Housing and Urban Development employee may have relied upon advice of counsel in refusing to cooperate in internal agency investigation relating to certain alleged improprieties did not excuse employee's conduct or otherwise render dismissal improper; employee was accountable for conclusions of her designated attorney to extent that she acceded to those conclusions or permitted counsel to act in her stead. 5 U.S.C.A. § 7512.

14. Administrative Law and Procedure ⇐474

Administrative tribunals are not required to monitor chosen counsel with the aim of ascertaining when representation reflects best interest of each party, insofar as such inquiry would relate to willfulness of given party's conduct.

Abraham I. Goldberg, New York City, argued, for petitioner. With him on the brief was John C. Morland, Washington, D.C.

Alexander Younger, Washington, D.C., argued, for respondent.

J. Paul McGrath, Asst. Atty. Gen., David M. Cohen, Director, Sandra P. Spooner and Jane W. Vanneman, Washington, D.C., were on the brief for appellee.

William C. Cregar and Donald U. Grant, U.S. Dept. of Housing and Urban Development, Washington, D.C., of counsel.

Before BENNETT, MILLER and SMITH, Circuit Judges.

BENNETT, Circuit Judge.

This is an appeal of the final order of the Merit Systems Protection Board (MSPB), No. NY 07528210194 (January 7, 1983), sustaining the Department of Housing and Urban Development (HUD) in removing petitioner, Ruby Weston, from her position as an equal opportunity specialist. We *affirm*.

BACKGROUND

Ms. Weston was first employed with HUD as a realty specialist in its New York Area Office from 1974 to 1977 and was then transferred to its Newark Area Office to serve as an equal opportunity specialist. Subsequently, HUD received information from the State of New York tending to show that her son was the actual buyer of real property on Pilling Street in Brooklyn, New York, sold by HUD when she was serving as a realty specialist exercising certain responsibilities toward the property and, further, that she subsequently received and endorsed a check from an insurance company in settlement of a claim for fire damage to the property. Richard J. Scott of the Office of the Inspector General of HUD commenced a criminal investigation into this possible conflict of interest by interviewing Ms. Weston on January 23, 1979. He informed her of the pending investigation and her rights under the law, including the right to remain silent and to have the advice of an attorney. She declined to sign a statement setting forth the matters discussed.

Thereafter, efforts to continue the interview with or without her attorney were unsuccessful. On October 20, 1980, Ms. Weston confirmed in person her refusal to continue the interview, and the matter was submitted for review by the United States Attorney, who declined prosecution.

On February 25, 1981, Ms. Weston and her attorney, Michelle Patterson, attended a meeting with Mr. Scott and HUD Acting Regional Inspector General, Earl F. O'Hara. They were given a copy of the statement below to follow as it was read aloud by Mr. O'Hara:

> Before we ask you any questions you must understand your rights and your responsibilities as an employee of the Department of HUD.

The purpose of this interview is to obtain your responses to questions concerning possible violations of the HUD Standards of Conduct (24 Code of Federal Regulations Part 0, Subpart B, 0.735–202(a)(b)(c)(d)(f); 0.735–204(a)(1)(4)(5)(6)(7)(8)(d); 0.735–205(a)(8)(b)(1); 0.735–210(b)) with respect to the purchase of the HUD-owned property located at 1 Pilling Street, Brooklyn, New York, during 1976 and your outside employment as they relate to your official duties.

You are advised that the United States attorney has declined criminal prosecution of you in the above matter. This is purely an administrative inquiry. You have all the rights and privileges, including the right to remain silent and the right to be represented by legal counsel, guaranteed by the Constitution of the United States, although, since you have a duty as an employee of HUD to answer questions concerning your employment, your failure to answer relevant and material questions, as they relate to your official duties, may cause you to be subjected to disciplinary action, including possible removal by the Department of HUD.

Any information or evidence you furnish in response to questions propounded to you during this interview, or any information or evidence which is gained by reason of your answer, may not be used against you in criminal proceedings; however, it may be used against you administratively.

It is significant that Ms. Weston was thus informed that (1) criminal prosecution against her had been declined by the United States Attorney, (2) no information gained from the interview could be used against her in a criminal proceeding, and (3) her failure to cooperate could subject her as a HUD employee to disciplinary action, specifically including removal from employment.

Ms. Weston refused to sign a form containing the above statement as an acknowledgment that it had been read to her. She requested until March 2, 1981, to consider whether to proceed with the interview. On that date she informed Mr. O'Hara that, based on the advice of her counsel, she would not participate further.

The removal of Ms. Weston for refusing to cooperate in an agency investigation (and other charges related to her abuse of an alleged commission as a notary public, which are not at issue here) was proposed on September 16, 1981, in a letter signed by her supervisor, Earl Fisher. It stated:

In light of the seriousness of the possible offenses that were involved in the Pilling Street matter and your continued refusal to cooperate with the investigation thereof and in view of your conduct in the representations and usage of your alleged position as a notary public, I find your actions sufficient to warrant, in order to promote the efficiency of the service, your removal from employment by this Department.

The maintenance of unusually high standards of honesty, integrity, impartiality and conduct by Government employees is considered by the Department to be essential to assure proper performance of Government business and the maintenance of confidence by citizens in their Government. This is especially true in the case of an employee whose position requires public contact as yours does. The avoidance by Government employees of misconduct or conflicts of interest is indispensable to the maintenance of these standards. 24 C.F.R. 0.735–101. To enable the Government to continue this high standard, we require HUD employees to cooperate with HUD's Office of the Inspector General when they conduct an investigation. HUD Handbook—Office of Inspector General, 2000.3A, paragraph 3–2(a).

. . . .

The Pilling Street facts and the circumstances involving the use of your notary stamp, as developed to date, raise grave implications as to your honesty, integrity and conduct as a Government employee. I cannot reach any conclusions, based on the Pilling Street facts, due to your re-

fusal to cooperate. However, I can and do conclude that the facts, as presently developed, have presented exceedingly serious circumstances which merited the most complete and thorough investigation possible. You should clearly understand that your refusal to cooperate does not relate to a possible *minor* violation of HUD's Standards of Conduct, but rather relates to the most *serious* violations contained therein. If true, these offenses could have resulted in a criminal prosecution. Such possibility has, of course, been removed by the action of the United States Attorney. (Emphasis in original.)

Ms. Weston was removed effective January 8, 1982, and appealed to the MSPB. The presiding official concluded that her attorney had misconstrued the statement read by Mr. O'Hara at the February 25, 1981, meeting as including a statement of Ms. Weston's *Miranda* rights and had failed to understand the operation of the rule in *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), that the threat of removal from one's position renders any statement compelled thereby inadmissible in a criminal proceeding, so that once having thus in effect received immunity, an employee can legitimately be removed for refusing to answer questions. Accordingly, Ms. Weston was found to have failed to cooperate in a legitimate agency investigation. The presiding official found that a nexus existed between that failure and the efficiency of her agency. The charge of abusing her alleged commission as a New York State notary, however, was determined not to have been proven by a preponderance of the evidence. For this reason, and because it was concluded that Ms. Weston had declined to answer agency questions out of a good faith reliance on the advice (albeit incorrect) of her attorney, the penalty of removal was mitigated to a 15-day suspension.

In the HUD appeal which followed, the MSPB affirmed the decision of the presiding official that Ms. Weston did not have a right to remain silent once she had received immunity by operation of the *Garrity* rule. Characterizing Ms. Weston's case as one that "involves serious allegations of conflict of interest and misuse of office," the MSPB determined that the normal range of penalties prescribed by HUD in a first instance of failing to cooperate with an investigation (a suspension of 5 to 30 days) was inadequate in this case. The board opinion stated:

> [M]ore serious penalties are warranted for more serious first offenses. HUD Handbook 752.2 REV–1, Appendix 3. Honesty, impartiality, and integrity are considered crucial to maintaining public confidence and assuring proper performance of government business, particularly when an employee's position requires public contact as does appellant's. Appellant's alleged misconduct, if proven, raises grave questions concerning her impartiality and integrity. The obstruction of justice that might result from her failure to cooperate under the circumstances is extremely serious.
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> One final factor, the availability of viable alternative sanctions, is particularly significant. If an agency was unable to compel cooperation by a grant of use immunity it might never be able to accumulate sufficient evidence to prove or disprove the underlying charge. Management's ability to investigate conflict of interest allegations would be effectively frustrated. Denial of removal as an appropriate sanction would cripple management's ability to maintain a disciplined and efficient work force, free of improper dealings by its employees.

The MSPB concluded that Ms. Weston's reliance on the erroneous advice of her counsel could not be permitted to mitigate an "otherwise reasonable penalty" and reimposed her removal.

OPINION

I

[1–4] The fifth amendment privilege against compulsory self-incrimination may be asserted in an administrative investigation to protect against any disclosure that

an individual reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 444–45, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). In addition, the threat of removal from one's position constitutes coercion which renders any statements elicited thereby inadmissible in criminal proceedings against the party so coerced. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Nevertheless, when an employee is once granted immunity through this so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation. *Gardner v. Broderick*, 392 U.S. 273, 278, 88 S.Ct. 1913, 1916, 20 L.Ed.2d 1082 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 284–85, 88 S.Ct. 1917, 1919–20, 20 L.Ed.2d 1089 (1968). Invocation of the *Garrity* rule for compelling answers to pertinent questions about the performance of an employee's duties is adequately accomplished when that employee is duly advised of his options to answer under the immunity granted or remain silent and face dismissal. *Kalkines v. United States*, 200 Ct.Cl. 570, 473 F.2d 1391, 1393 (1973).

[5] Thus, as reasoned in *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d 619, 626 (2d Cir.1970), *cert. denied*, 406 U.S. 961, 92 S.Ct. 2055, 32 L.Ed.2d 349 (1972):

> To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights.

The record clearly discloses that at the meeting of February 25, 1981, Ms. Weston and her counsel were in effect advised of the invocation of the *Garrity* rule by the statement distributed and read by Mr. O'Hara. Thus, there is no question that Ms. Weston's refusal then and subsequently to participate in the proposed investigation was not justifiable out of any valid fifth amendment considerations, and the charge of refusing to cooperate during an official HUD inquiry was correctly sustained by the MSPB.

Petitioner argues nevertheless that her dismissal as a result is improper because (1) it does not promote the efficiency of her employing agency, as required by 5 U.S.C. § 7513(a) (1982), and (2) it represents an abuse of agency discretion in that (a) it exceeds the range of penalties provided for in HUD regulations, and (b) it is imposed for actions undertaken by petitioner not willfully, but in a good faith reliance upon the erroneous advice of her attorney.

These issues will be addressed in turn. In doing so, the decision of the MSPB is to be affirmed unless the action of HUD in terminating Ms. Weston has been shown to have been arbitrary, capricious, an abuse of discretion, not in accordance with law, not obtained in accord with procedures required by law, rule or regulation, or unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1982).

II

[6, 7] Removal, being an adverse agency personnel action among those listed in 5 U.S.C. § 7512 (1982), must according to the requirements of 5 U.S.C. § 7513(a) (1982) be effected "only for such cause as will promote the efficiency of the service." The finding of the board that Ms. Weston's termination would promote the efficiency of her agency is a factual finding which is to be sustained on appeal unless that administrative determination is not supported at least by substantial evidence from the record taken as a whole. *Brewer v. United States Postal Service*, 227 Ct.Cl. 276, 647 F.2d 1093, 1096 (1981), *cert. denied*, 454 U.S. 1144, 102 S.Ct. 1005, 71 L.Ed.2d 296 (1982). The record need only disclose such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S.